WESTERN UNION TELEGRAPH COMPANY v. GODDIN.*

Supreme Court of Appeals: At Richmond.

April 8, 1897.

1. APPEALS AND WRITS OF ERROR—*Questions not debatable—Sec. 1292 of Code.* A writ of error is properly dismissed, as improvidently awarded, where the jurisdiction of the Court is dependent upon a question which was no longer debatable at the time the writ was awarded. Applying this test to the case at bar the constitutionality of sec. 1292 was not a debatable question at the time the writ of error was awarded and it should be dismissed.

Error to a judgment of the Court of Law and Equity for the city of Richmond, rendered May 29, 1895, in an action of debt wherein the defendant in error was the plaintiff, and the plaintiff in error was the defendant. *Writ of error dismissed.*

This was an action of debt instituted by E. C. Goddin to recover the penalty prescribed by sec. 1292 of the Code for failure to deliver to him promptly the following telegram sent from Baltimore, Md.:

"To E. C. GODDIN,

"*3015 E. Main street, Richmond, Va.:*

"Your son is at City Hospital dangerously injured. DR. BLAKE."

Stiles & Holladay, for the plaintiff in error.

Edmund Waddill, Jr. and *J. Samuel Parrish,* for the defendant in error.

KEITH, P., delivered the opinion of the court.

The defendant in error brought an action of debt in the Law and Equity Court of the city of Richmond to recover of the Western Union Telegraph Company the sum of $100, the penalty prescribed by sec. 1292 of the Code for failure to promptly deliver a dispatch. The defendant demurred to the plaintiff's declaration upon the ground that sec. 1292 of the Code upon which the plaintiff's right of action is based is in controvention of Article 1, section 8 of the Constitution of the United States, and is therefore void. It also offered a plea presenting the same proposition of law, but the court overruled the demurrer to the declaration and rejected the plea; thereupon evidence being introduced, the defendant offered certain instructions, the first of which also raises the same constitutional question presented in the demurrer and plea. The court refused to give this instruction. Other instructions

*Reported by M. P. Burks, State Reporter.

were offered by the defendant and refused by the court and certain instructions were given by the court over the objection of the plaintiff in error, to all of which rulings the plaintiff in error duly excepted. There was a verdict for the defendant in error and a motion to set it aside, which was overruled, and the plaintiff in error again excepted and subsequently applied for and obtained a writ of error from one of the judges of this court.

On behalf of the defendant in error it is contended that this court is without jurisdiction, the amount being less than $500.

On behalf of the plaintiff in error the jurisdiction of this court is maintained upon the ground that a constitutional question is involved.

The writ of error was awarded in this case on the 2d of October, 1895.

On November 16, 1893, this court, in the case of *Western Union Telegraph Company* v. *Tyler*, 90 Va. 297 held, Judge Lewis delivering the opinion, that sec. 1292 of the Code is not in conflict with the Constitution of the United States or any Act of Congress passed in pursuance thereof, and in *Western Union Telegraph Company* v. *Bright*, 90 Va. 778, that position was reaffirmed; and in the case of the *Same Company* v. *James*, 162 U. S. 650, similar provisions in a statute of the State of Georgia were held to be a reasonable exercise of the police power of the State and not in conflict with the Federal Constitution.

In the recent case of *Western Union Telegraph Company* v. *Powell*, decided at the February term, there were two counts in the declaration, the first based upon sec. 1291, and the other upon sec. 1292. There was a judgment against the Company in the trial court; a writ of error awarded by this court, and a motion to dismiss for want of jurisdiction. Judge Buchanan delivering the opinion, after referring to the cases just cited, says: "When this writ of error was awarded sec. 1291 had not been held by this court to be constitutional, nor had the decision in the *James Case* been made by the Supreme Court of the United States, holding such legislation to be a valid exercise of the police power. Under the circumstances surrounding this case, we cannot say that the jurisdiction of this court was not invoked in good faith to determine the constitutionality of the statutes in question. Its jurisdiction having been properly invoked upon one of the grounds provided in the Constitution and laws, it has jurisdiction for all purposes, although the amount involved is less than $500."

At the time the writ of error in the case before us was awarded the constitutionality of sec. 1292 had been twice passed upon in this court and it was no longer a debatable question. The test of "good faith"

does not fully meet the difficulty. Counsel and parties may with perfect good faith ask the reiterated judgment of this court upon any question, and we do not clearly perceive how this court could say at just what point the appeal to it was wanting in good faith. A better test, perhaps, is to be found in considering whether or not the point presented is any longer open for argument. Is it a debatable question? See Enc. of Plead. and Pr., p. 40-41; *Virden* v. *Allen*, 107 Ill. 505; *Chaplin* v. *Highway Commissioners*, 126 Ill. 264. Applying this test, it is plain that the constitutionality of sec. 1292 is not an open one in this court. It is no longer "debatable."

We are of opinion that the writ of error heretofore awarded should be dismissed.

MENTAL ANGUISH.

FOR THE EDITOR.—The character of the message in the principal case suggests the enquiry, can damages be recovered for mental anguish only? This question has not been passed upon in Virginia, nor in a number of other States. So far as it has been passed upon in other States the cases are in irreconcilable conflict. Text-books and reported cases seem to be about equally divided. Without attempting to cite the cases it may be stated that Texas, Tennessee, Kentucky, Indiana, North Carolina, Iowa, and perhaps one or two other States allow such actions to be maintained, while Maine, Nevada, Kansas, Mississippi, Georgia, Minnesota, Wisconsin, Missouri, and others, hold that such actions cannot be maintained. The English courts, and it is believed most of the Federal courts, hold with the latter class of cases and deny the right to maintain such actions, The authorities *pro* and *con*, or the most of them, will be found collected under the following cases. *Western Union Tel. Co.* v. *Wood*, 21 L. R. A. 706; *International Ocean Tel. Co.* v. *Saunders*, 21 L. R. A. 810 and note; *Francis* v. *Western Union Tel. Co.*, 25 L. R. A. 406; *Western Union Tel. Co.* v. *Rogers*, 13 L. R. A. 859; *West* v. *Western Union Tel. Co.*, 7 Am. St. Rep. 530 and note; *Western Union Tel. Co.* v. *Rogers*, 24 Am. St. Rep. 300 and note; *Ewing* v. *Pittsburg &c. Ry. Co.*, 30 Am. St. Rep. 709 and note, and *Summerfield* v. *Western Union Tel. Co.*, 41 Am. St. Rep. 1.

In the case of *Martin* v. *Western Union Tel. Co.* (not reported), decided a few years ago by Judge Paul, sitting as Circuit Judge for the Western District of Virginia, the right to recover damages for injury to feelings only was denied, and the case dismissed on demurrer. In the case last mentioned two telegrams were sent by a friend to a father. The first one was: "Come at once, your child is very sick." On the following morning a further telegram was sent announcing the death of the child. Neither telegram was delivered, and the father sued in tort, averring negligence on the part of the defendant in failing to deliver the telegrams. The defendants demurrerd, admitted the negligence charged. On behalf of the plaintiff it was argued that sec. 1292 of the Code imposed a legal duty on the defendant to promptly deliver the telegrams entrusted to it, and that the plaintiff had been brought into such relations with the defendant that he had the right to demand the performance of that duty, and that, having failed to perform it, sec.

2900 of the Code gave him, as the party injured, the right to recover of the defendant such damages as he had sustained by reason of the violation of that duty. The language of the statute is:

"*Damages for Violation of a Statute.*—Any person, injured by the violation of any statute, may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages."

It was furthor argued: "The language of the statute is very comprehensive. The kind of injury is not specified. It is not limited to injury to the property, estate. or reputation, nor to the person. It may be any injury; and the person injured (whether in reputation, or estate, *bodily* or *mentally*) may recover *such damages* as he has sustained by reason of the violation. This statute (substantially the same) came under review of the Court of Appeals of Virginia in the case of *Western Union Tel. Co.* v. *Reynolds*, 77 Va. 173, where this same defendant sought to escape liability for failure to transmit a cipher telegram, and Lacy, J., delivering the opinion of the court (in which, however, Lewis, J., did not concur), said that the penalty denounced by the statute was for failure to transmit "a dispatch." "There is no distinction drawn in the law as to one sort of promptitude, with refence to one kind of dispatch, and another sort, and less degree of promptitude with reference to another kind of dispatch."

"A telegraph company in this State is required to send every dispatch presented to it," &c., p. 189. The case just cited was a case of pecuniary damage and is only cited to show the view taken by the court of the statute. The court's attention is particularly invited to what is said on p. 189-90. Clearly, under the court's construction of the statute, every violation of the statute gives a cause of action for *some damages*, even though nominal, to whomever, by contract or otherwise, has placed himself in such position with reference to the company, as to have the right to demand the fulfilment of its legal duty.

In this case the plaintiff has placed himself in that position. He had the right to demand that his dispatch should be promptly transmitted and *promptly delivered.* The negligent failure to discharge this duty injured the plaintiff. It injured him in the eye of the law. It was a *violation of a statute* which *per se* gave the plaintiff a *cause of action* against the defendant, regardless of whether his feelings were injured or not. So that the plaintiff has an independent, legal cause of action, not solely because of "mental pain and anguish," but because the *statute* gives it to him. And having such independent cause of action the mental pain and anguish, at least to the extent of compensation, may be given in evidence. Broom, in his work on Legal Maxims (side p. 183) says: "It is true, therefore, that in trespass and for torts generally, new actions may be brought as often as new injustice and wrongs are repeated; for, as remarked by Sir W. Blackstone, 'wherever the common law gives a right or prohibits an injury it also gives a remedy by action, and, therefore, whenever a new injury is done a new method of remedy must be pursued.' And on the same principle, every statute made against an injury, mischief, or grievance, impliedly gives a remedy, for the party injured may, if no remedy be expressly given, have an action upon the statute, and if a penalty be given by statute, but no action for the recovery thereof be named, an action of debt will lie for the penalty. And in like manner, when a person has an important public duty to perform, he is bound to perform that duty, and if he neglects or refuses so to

do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury that he has so sustained." But even independently of the statute cited, the plaintiff had cause of action against the defendant *by virtue of his contract.* The defendant by contract had, at least impliedly, if not expressly, undertaken to discharge its legal duty, to-wit, promptly to transmit and deliver. It negligently failed to do so. The contract was a valid and binding contract between the parties, the parties were competent, it was touching a lawful subject-matter, there was a valuable consideration agreed upon and paid, and the terms of the contract were agreed on between the parties. There was a breach by the defendant. For the breach of every such contract the plaintiff is entitled to his action and to recover at least nominal damages. This principle is axiomatic, and has found fit expression in the legal maxim, "*ubi jus ibi remedium.*" In *Chapman* v. *Western Union Tel. Co.*, (Ky.) 13 S. W. Rep. 880, the court, *inter alia*, says: "If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for some damage. *It has violated its contract, and whenever a party does so, he is liable, at least to some extent. Every infraction of a legal right, causes injury in contemplation of law.* The party being entitled in such case to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? And in *Stewart* v. *Western Union Tel. Co.* (66 Tex. 580), s. c. 59 Am. Rep. 623, 625, the court says: 'For the breach of the contract the appellee was liable at all events for nominal damages,' and for this proposition cites *Telegraph Co.* v. *Drybury*, 35 Penn. St. 298; see also 1 Sutherland on Damages, 11. We cannot think, however, that it will be seriously denied that the breach of every contract entitles the other party to at least *nominal damages.* It was not, on the oral argument, and we do not suppose it will be here. No point has heretofore been made about this action being brought by the sendee of the message. We do not know that there will be. At all events, the declaration states a case where the sender was plainly the agent of the sendee, or if not, the contract at least was made for the *sole benefit* of the sendee. This brings the case within the very terms of sec. 2415 of the Code, which provides: 'And if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.' See *Clemmit* v. *New York Life Ins. Co.*, 76 Va., on p. 360. For these reasons we insist that the plaintiff had a cause of action for at least nominal damages, independently of his 'mental pain and anguish,' and that this action is properly brought in his name."

Without meaning to commit ourselves to the above views, we insist that a great injury was done the plaintiff, for which a remedy should be provided, and if, under the existing law, the plaintiff could have no redress, then sec. 1292 should be amended so as to fix the forfeiture at a much larger sum than one hundred dollars, or else fix a minimum and maximum limit within which a jury may give adequate relief. In no other way can adequate relief be assured for negligence in the transmission and delivery of social telegrams.

M. P. B.